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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931.

No. 457

PATRICK J. HURLEY, SECRETARY OF WAR, ET AL.,
Petitioners,

versus

R. FOSTER KINCAID, SR.,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

ANSWER OF R. FOSTER KINCAID, SR., RESPONDENT, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI IN ABOVE STYLED CAUSE.

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ANSWER OF R. FOSTER KINCAID, SR., RESPONDENT, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI IN ABOVE STYLED CAUSE.

R. Foster Kincaid, Sr., Respondent in the above styled and numbered cause, herewith respectfully presents his opposition to the granting by this Honorable Court of the petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit in the above styled and numbered cause, and for cause as to why said writ of error

should not be granted, he respectfully submits the following statement of facts and propositions of law:

The grounds upon which petitioners rely for an allowance of the writ as set forth in said petition, are as follows:

QUESTIONS PRESENTED BY PETITIONERS.

1. Whether the Flood Control Act of May 15, 1928, requires the United States to acquire respondent's property, or flowage rights over the same, before entering upon the construction, in the so-called Boeuf Basin, of levees and other works authorized by that Act.

2. Whether the action taken by the petitioners, who have merely advertised for and received bids for the construction of portions of the work to be performed in the Boeuf Basin under the Flood Control Act, constitutes a taking of respondent's property for which he is entitled to compensation under that Act or under the Federal Constitution.

3. Whether the respondent has presented a case for equitable relief.

4. Whether the United States is an indispensable party to the suit.

SPECIFICATIONS OF ERRORS BY PETITIONERS.

The Circuit Court of Appeals erred—

1. In holding that this was not a suit against the United States.

2. In holding that the United States was not a necessary party.

3. In holding that the District Court had jurisdiction.

4. In holding that the bill of complaint presented a case for equitable relief.

5. In holding that respondent did not have an adequate remedy at law.

6. In holding that the Flood Control Act of May 15, 1928, requires the United States to pay for flowage rights over respondent's property before proceeding with the construction in the Boeuf Basin of the projects authorized by the Act.

7. In holding that the construction by the United States of flood-control works in the Boeuf Basin, as provided by the Act of May 15, 1928, would amount to a taking of respondent's property in violation of that Act and the Fifth Amendment to the Constitution of the United States.

8. In finding that under the proposed plan for flood control "additional destructive flood waters" will be "diverted" over the respondent's land.

9. In affirming the decree enjoining petitioners.

This Court in the case of ***Furness, Withy & Company, Limited, v. Yang-Tsze Insurance Association, Limited, et al. (p. 430, vol. 242 U. S.)*** say, in the matter of petitions for writs of certiorari, "that it is incumbent upon counsel for both sides to see that the petition and reply thereto disclose the real situation * * * that the Court is not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs."

We respectfully submit that the petitioner in this case has not fully disclosed the real situation. The Circuit Court of Appeals from which writ of error is sought to this Court did not hand down a detailed written opinion, but adopted as its opinion the opinions of Judge Ben C. Dawkins, United States District Judge, Western District of Louisiana, Monroe Division, from which decision the petitioners herein, defendants below, had appealed to the Circuit Court of Appeals for the Fifth Circuit, and which Court, as stated above, adopted the opinions of Judge Dawkins as its opinion in this case. ***49th Fed. (2nd) page 768.***

ALLEGATIONS OF THE BILL OF COMPLAINT.

The bill of complaint in this case is found on pages 1 to 7 of the printed record. The bill was directed in the first instance against the United States Government, James W. Good, Secretary of War, an inhabitant or resident of the city of Washington, District of Columbia; Major General Edgar Jadwin, Chief of Engineers, United States Army, an inhabitant or resident of the city of Washington, District of Columbia; Mississippi River Commission, a Federal commission created and existing under and by virtue of an act of Congress, dated June 28, 1879, with headquarters and general offices located in the United States customhouse, in the city of St. Louis, in the State of Missouri; Brig. Gen. T. H. Jackson, an inhabitant or resident of the city of St. Louis, in the State of Missouri, and president of the Mississippi River Commission; Charles H. West, an inhabitant or resident of Greenville, in the State of Mississippi; Robert L. Faris, an inhabitant or resident of the city of Washington, in the District of Co-

lumbia; Edward Flad, an inhabitant or resident of the city of St. Louis, in the State of Missouri; John H. Stipes, an inhabitant or resident of Champaign, in the State of Illinois; Col. Jarvis Bain, an inhabitant or resident of the city of Pittsburgh, in the State of Pennsylvania; and Major Ernest Graves, an inhabitant or resident of the city of Washington, in the District of Columbia; Major John C. H. Lee, a resident of and an inhabitant of Vicksburg, State of Mississippi; that, with the exception of James W. Good, Secretary of War, Major General Edgar Jadwin, Chief of Engineers, and Major John C. H. Lee, the above-named individual defendants, are members of and compose the Mississippi River Commission.

Paragraph 3 of the bill states that it is a suit of a civil nature and is a controversy arising under the Constitution and laws of the United States, to-wit, the fifth amendment to the Constitution of the United States and an act of Congress. That it is also a suit of a local nature and involves the title of land situated in the western district of Louisiana. That the amount in controversy, exclusive of interests and costs, exceeds the value of $3,000.00 and is less than the value of $10,000.00. That on May 15, 1928, the United States Government, by an Act of Congress, adopted a project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927. That the said adopted plan or project differed from the old Flood

Control system of levees, and levees only, by providing for the creation of certain diversion channels by which the water of the Mississippi River was diverted and taken out of the main river. That, in pursuance of and in the carrying out of said project, the United States Government, and James W. Good, Secretary of War; Maj. Gen. Edgar Jadwin, Chief of Engineers, and the Mississippi River Commission, and Maj. John C. H. Lee, pretending to be acting under authority of an act of Congress of the United States, adopted and approved on May 15, 1928, are preparing to construct a certain floodway or diversion channel, designated under the adopted project as the Boeuf Floodway or Diversion Channel. The purpose of this floodway or diversion channel is to divert water from the main channel of the Mississippi River into the basin of this floodway and to use this basin as a diversion channel to lower the level of the water in the Mississippi River and to carry it through this diversion channel to some other point. That this diversion channel or floodway was not intended in any way for the benefit of the property owners in the floodway or diversion channel. On the contrary, property situated in the area of this diversion channel or floodway would be destroyed or rendered valueless.

The Bill further alleged that

"Sec. 4 of the flood control act of May 15, 1928, provides as follows:

'Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River * * *.'

"The water that will flow into the Boeuf Floodway or Diversion Channel will all be diverted from the main channel of the Mississippi River. The main levee of the Mississippi River at this point will be retained, but will be raised above and below so that, at this point, it will be lower than the levee above and below, and will constitute what Major General Jadwin terms in his report as a fuze-plug levee, is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway. In other words, it is an uncontrolled spillway. Guide levees are to be constructed on each side of this basin. The width of the basin between the guide levees will be from approximately eight to eighteen miles wide, extending from Cypress Creek to the Red River. The construction of these guide levees will have the effect of making a floodway or pocket for the flow of water intentionally diverted from the Mississippi River through this diversion channel, and this diverted water will have the effect of destroying the value of all property situated within the flood area. The project adopted by Congress in the flood control act of May 15, 1928, specifically set apart this diversion channel or floodway as a part of the project, and, as stated above, the said agents of the Government are now proceeding to construct the guide levees, so as to enclose this diversion channel and specifically define its boundaries and is designedly making this channel a floodway or diversion channel. The Government, through its agents, the Secretary of War, Major General Jadwin, and the Mississippi River Commission, has publicly announced, and it is a notorious fact, that the property in this diversion channel is to be used as a floodway; and the Secretary of War, acting through Major General Jadwin, Chief Engineer, is, at this time, advertising for and receiving bids for the construction of the guide levees to enclose this channel,

which will have the effect of fixing the bounds of this diversion channel and floodway, and at floodwater it is intended, by the use of what the Government designates as fuze-plugs or low places in the main levee, to flood this entire channel so fixed and designated by them as such, the lands and properties located between the guide levees and the main levee to be the floor of the floodway or diversion channel.

"That the complainant owns lands, with improvements thereon, which are located within the area or the bounds of this diversion channel or floodway. That the value of these lands affected or taken for this diversion channel or floodway will approximate the sum of $9,000.00.

"That the above described lands lie within the area affected by said proposed plan and within the area which will be surrounded by the guide levees and the main river; that, as above stated, all of said lands are highly improved and are, at this time, being used for agricultural purposes; that there are located thereon complainant's residence and other valuable farm buildings; that, at this time, all of complainant's above-described lands lie back of the Mississippi River levee and are protected at all times from the waters of the Mississippi River, if the levees hold.

"That in the construction of said proposed guide levees all of complainant's above-described lands will be taken and used for floodway or diversion channel and will become a part of the floodway and diversion channel and be subject to overflow from the Mississippi River in time of flood, and, under the adopted project, it is intended that they shall be flooded; that said land will be rendered unfit for agricultural purposes or for any other purpose save that of serving as a part of a floodway or storage basin when the Mississippi River is at flood stage.

"That the defendants, Major General Jadwin, the Mississippi River Commission, and Major Lee, pretending to be acting under authority of an act of Congress of the United States adopted and approved May 15, 1928, are proceeding with the work of constructing said proposed guide levees and other construction work incident thereto in the carrying out of the project adopted by Congress; that this will, in effect, be the taking by the United States Government of all of said above-described real estate belonging to said complainant for the purpose of carrying out said project without due process of law and without just compensation.

"That the War Department, acting through United States Engineers' Office, at this time is advertising for bids for the construction of these guide levees, and, unless restrained from doing so, bids will be received on June 17, 1929, and contracts let thereon in due course.

"That the overt acts of the defendants, Major General Jadwin, the Mississippi River Commission, and Major Lee, pretending to act under an act of Congress of May 15, 1928, in advertising for bids for the letting of contracts for the doing of said work in the construction of said guide levees, in proposing to award contracts for the construction of said proposed guide levees will mean the taking by the United States Government of complainant's lands and properties without due process of law and without just compensation."

Complainant further alleged, in substance, that the defendants in setting apart this property as a floodway and diversion channel and in advertising for and receiving bids for the doing of the proposed work, to-wit, the construction of the guide levees and the contemplated acts of the defendants in the awarding of contracts therefor, has

already had the effect of casting a cloud upon the title of complainant to his said lands and properties and have materially affected his use and enjoyment of same and have materially affected and impaired the value thereof. That, as the result of setting apart this area as a floodway or diversion channel and the publication by defendants of said advertisement, complainant's property has not only deteriorated in value but complainant's title to same has been seriously clouded, his use of same has been seriously affected, and complainant would be unable to borrow money on said lands, sell or dispose of same. That, as a result of making this area, in which complainant's lands and those of others are situated, a floodway or diversion channel, these lands will be rendered unfit for agricultural or any other purpose. That the additional destructive flood waters that will pass by reason of diversion from the main channel through this diversion channel will destroy complainant's property. That the defendants have not commenced any condemnation proceeding against complainant for this property, and no compensation has been paid him, or offered him, but that the defendants are seeking to award contracts for the immediate construction of guide levees and to make a diversion or floodway channel in this area without having obtained by condemnation or otherwise the property of complainant or flowage right over same.

Complainant further stated that his injury would be irreparable, that if contracts for the guide levees were awarded before complainant had been compensated for his property or secured in the payment of compensation for same, the contracts would involve such large sums that

complainant would be unable to give bond sufficient to enjoin same and thus protect his property from confiscation by reason of the proposed unlawful acts of the defendants. That complainant had no full, adequate and complete remedy at law.

The bill further alleged, in substance,

"The said act further provides, in section 4, that if condemnation proceedings are commenced to obtain properties which, in the opinion of the Secretary of War and the Chief of Engineers, are needed to carry out the project, the proceedings will be under the provisions of sections 5 and 6 of the river and harbor act of July 18, 1918. Section 5 of that act expressly provides that before the United States can acquire possession of property needed it shall first file its petition for condemnation, after which it shall have the right to take immediate possession of said lands and proceed with the public works thereon only upon the following conditions: 'That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceeding shall be instituted.'

"The defendants herein are undertaking to take possession of complainant's property without first filing a condemnation suit or without first purchasing same from him. That the construction of the guide levees will, in effect, be taking possession of complainant's property by the United States Government without just compensation to complainant."

The bill, in substance, was for the purpose of enjoining certain parties from taking the lands of complain-

ant or using same for flowage rights without first either condemning the lands or flowage rights or paying for them.

The defendants in the District Court moved to dismiss the bill on the grounds, among others, (1) that the action was one against the United States, (2) that the court was without jurisdiction, (3) that the bill disclosed no ground for equitable relief, and (4) that the bill disclosed no cause of action. (R. 8-9.) The District Court, construing the bill as charging that the petitioners were proceeding in violation of both the Flood Control Act and the Constitution, held that the United States could not or need not be a party, and that it should be dismissed as a party. (R.10-15.) The court overruled the motion to dismiss the suit on the ground that the Flood Control Act required the United States to condemn or acquire flowage rights over the respondent's property before going ahead with the flood-control project in the Boeuf Basin. (R. 15-27.)

Thereupon the petitioners answered the bill, putting in issue its material allegations. (R. 27-29.)

The United States District Judge handed down two written opinions in the cause, said opinions setting forth fully all the facts and citing fully the authorities upon which the Court based its opinion. These opinions were adopted by the Circuit Court of Appeals for the Fifth Circuit as the opinion of that Court, and it is from the decision of the Circuit Court of Appeals that the petitioners are seeking a writ of certiorari.

For the sake of brevity, this defendant will adopt as his statement of the case and as his brief of authorities,

the two opinions of Judge Dawkins rendered in this case, which are as follows:

OPINION ON MOTION TO DISMISS.

"Dawkins, J.:

"'This is a suit in equity against the United States, the Secretary of War, Chief of Engineers, the Mississippi River Commission and its individual members, and the district engineer in charge of work in this district to enjoin the construction of certain levees and other works contemplated by the act of Congress approved May 15, 1928, 70th Congress, Pub. No. 391, commonly known as the flood control act.

"The plaintiff alleges that he is the owner in fee simple of 160 acres of land, with improvements thereon of the value of the $9,000.00, situated between the levees to be constructed on either side of the Boeuf River basin and within the channel through which a portion of the waters from the main stream of the Mississippi River will be diverted at flood stage by what is called a 'fuse-plug' outlet, located just below Arkansas City, in the State of Arkansas; that the purpose is to use this basin as a diversion channel to lower the level of water in the Mississippi River and to carry it into Red River at or near the head of the Atchafalaya; that the effect will be to relieve the pressure on the main levees and to protect property on both sides of the Mississippi from Cape Girardeau, Missouri, to the Passes, as a part of the adopted project to control flood waters in the Mississippi Valley, and that it is not intended in any way for the benefit of the property within said floodway or diversion channel, but, on the contrary, the same will be destroyed and rendered valueless. The plaintiff further alleges as follows:

"'The water that will flow into the Boeuf Floodway or Diversion Channel will all be di-

verted from the main channel of the Mississippi River. The main levee of the Mississippi River at this point will be retained, but will be raised above and below so that, at this point, it will be lower than the levee above and below, and will constitute what Major General Jadwin terms in his report as a fuse-plug levee. The purpose of leaving this levee lower or creating a fuse-plug levee is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway. In other words, it is an uncontrolled spillway. Guide levees are to be constructed on each side of this basin. The width of the basin between the guide levees will be from approximately eight to eighteen miles wide, extending from Cypress Creek to the Red River. The construction of these guide levees will have the effect of making a floodway or pocket for the flow of water intentionally diverted from the Mississippi River through this diversion channel, and this diverted water will have the effect of destroying the value of all property situated within the flood area. The project adopted by Congress in the flood control act of May 15, 1928, specifically set apart this diversion channel or floodway as a part of the project, and, as stated above, the said agents of the Government are now proceeding to construct the guide levees, so as to enclose this diversion channel and specifically define its boundaries and is designedly making this channel a floodway or diversion channel. The Government, through its agents, the Secretary of War, Major General Jadwin, and the Mississippi River Commission, has publicly announced, and it is a notorious fact, that the property in this diversion channel is to be used as a floodway; and the Secretary of War, acting through Maj. General Jadwin, Chief Engineer, is, at this time, advertising for and receiving bids for the construction of the guide levees to enclose this channel which will

have the effect of fixing the bounds of this diversion channel and floodway, and at floodwater it is intended by the use of what the Government designates as fuse plugs or low places in the main levee, to flood this entire channel, so fixed and designated by them as such, the lands and properties located between the guide levees and the main levee to be the floor of the floodway or diversion channel.'

"He also alleges that his said land is at this time in a high state of cultivation and has thereon his residence and other valuable buildings; that it now lies back of the Mississippi River levees and is protected at all times from the waters of that river, 'if the levees hold'; that if the proposed plan is carried out it is purposely intended that his property, with that of others, will form the bed of said diversion channel and serve as a storage basin for waters of the Mississippi, making it wholly unfit for farming, for which it is solely valuable; that this will, in effect, be the taking of petitioner's property by the Government without due process of law and without just compensation, contrary to the 14th and 5th amendments to the Federal Constitution; and that defendants are now advertising for bids for the construction of said guide levees and unless restrained bids will be received and contracts let therefor in due course.

"It is also further alleged as follows:

'That the acts of the defendants in setting apart this property as a floodway and diversion channel and in advertising for and receiving bids for the doing of the proposed work, to-wit, the construction of the guide levees and the contemplated acts of the defendants in the awarding of contracts therefor, has already had the effect of casting a cloud upon the title of complainant to his said lands and properties and have materially affected his use and enjoyment of same, and have

materially affected and impaired the value thereof. That, the result of setting apart this area as a floodway or diversion channel and the publication by defendants of said advertisements for bids for the construction of the guide levees, this property has not only deteriorated in value but complainant's title to same has been seriously clouded, the use of same has been seriously affected, and complainant would be unable to borrow money on said lands, sell or dispose of same, or interest persons in operating said lands for farms or for any other purpose, owing to the fact that the Government has indicated that it has taken possession or intends to take immediate possession of this property for a diversion channel or a floodway. That, as a result of making this area, in which complainant's lands and those of others are situated, a floodway or diversion channel, these lands will be rendered unfit for agricultural or any other purpose. That the title to complainant's lands is seriously clouded by said acts, and his ability to use said properties or obtain credit thereon is seriously affected, and, as stated above, this property is well worth the sum of $9,000.00.

'Complainant would further state that, although the flood control act of May 15, 1928, sec. 4, above recited, and the Constitution of the United States, fifth amendment, which provides:

"* * * nor shall any person * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken, for public use without just compensation," require the United States Government to justly compensate complainant for his property taken, damaged, or destroyed, the defendants herein are not complying in any way either with the constitutional provision or with the provision of sec. 4 of the flood control act. Without having obtained complainant's property, without having com-

menced any condemnation proceeding, they are proceeding to take over property in this area, enclose same with levees, and designedly overflow same during floodwater. That no condemnation proceeding has been commenced against complainant for this property, no compensation has been paid him or offered him, but the said agents of the United States Government are seeking to award contracts for the immediate construction of the guide levees and to make a diversion or floodway channel in this area.

'That the damage to this complainant will be irreparable; that it is a well-known fact that any suit against the United States to recover money for damages or property is subject to interminable delays and is very expensive. Complainant would further state that if said contracts for the guide levees are awarded before complainant has been compensated for his property or secured in the payment of compensation for same, the contracts would involve such large sums that complainant would be unable to give bond sufficient to enjoin same and thus protect his property from confiscation by reason of the proposed unlawful acts of the defendants. That complainant has no remedy at law and if said contracts are awarded he will immediately suffer irreparable injury and loss.

'Complainant would further state that under section 4 of the flood control act of May 15, 1928, it is provided that the Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project. The Secretary of War and the Chief of Engineers have already agreed and notoriously announced that property in the Boeuf floodway or area is necessary to carry out the project. The said section 4

provides that "when the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price." Complainant has never fixed a price upon his land, nor donated or conveyed same to the Government, nor has the Secretary of War tendered to him any price for same, nor has any condemnation proceeding been commenced to acquire same.

'The said act further provides, in section 4, that if condemnation proceedings are commenced to obtain properties which, in the opinion of the Secretary of War and the Chief of Engineers, are needed to carry out the project, the proceedings will be under the provisions of section 5 and 6 of the river and harbor act of July 18, 1918. Section 5 of that act expressly provides that before the United States can acquire possession of property it shall first file its petition for condemnation, after which it shall have said lands and proceed with the public works thereon only on the following conditions: "That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceeding shall be instituted."

'The defendants herein are undertaking to take possession of complainant's property without first filing a condemnation suit or without first purchasing same from him. That the construction of the guide levees will, in effect, be taking possession of complainant's property by the United States Government without just compensation to complainant.'

"Plaintiff prays that the defendants be enjoined from carrying out any of the work of the said Boeuf River floodway, and pending hearing that a restraining order issue prohibiting them from awarding contracts or building said levees and for general relief.

"The restraining order was denied, but in view of the importance of the case, counsel for the Government were called in and informed of the presenting of the petition. It was suggested that the defendants prepare to meet the issues promptly so that the courts might make a conclusive decision of the questions involved with as little delay as possible. Thirty days were allowed for this purpose, and the time was extended for an additional week at the request of counsel for the defendants.

"On the day of the hearing the defendants filed a motion to dismiss upon the following grounds:

'1. That this court is without jurisdiction.

'2. That the United States is a sovereign power and can not be sued without its consent.

'3. That a suit against the other defendants is in effect a suit against the United States and that an official of the Government of the United States can not be sued when there is no personal judgment sought against him and he has no personal interest in the matter involved.

'4. That the court has no jurisdiction under the bill of complaint.

'5. That there is a misjoinder of parties defendant herein.

'6. That it appears from the bill of complaint, with the exception of the United States, that the respondents therein named are not acting in a personal or individual capacity, or engaged in

the performance of any act or acts other than those prescribed by the laws of the United States, and all of their acts are official and as the representatives of the United States.

'7. That the complainant is not entitled to relief in equity inasmuch as he has a plain, adequate, and complete remedy at law.

'8. In the alternative, and only in the alternative, should the court overrule this motion to dismiss for all of the above and foregoing reasons, then and in that event respondents show that the said bill of complaint discloses no cause of action or no right of action.'

"In reality there are only four points raised: (1) Grounds 1, 2, 3, 4, and 6 set up the want of jurisdiction because it is claimed the case is one against the Government which has not given its consent to be sued; (2) No. 5 is a plea of misjoinder of parties defendant; (3) No. 7 asserts that the bill discloses no ground for equitable relief, for petitioner has an adequate remedy at law; (4) while specification No. 8 is a plea of no cause or right of action.

"It will be noted that the motion does not challenge the venue of this court, upon the ground that the defendants are not domiciled within its territorial limits, and the general appearance made amounts to a waiver of that question. Lee vs. Chesapeake & Ohio, 260 U. S., 565.

"Counsel for petitioner rely upon paragraph 20 of section 24 of the Judicial Code (U. S. C. C.) as authorizing the making of the United States a party to this suit. The theory advanced is that since the Government has the right to condemn plaintiff's property for the purpose for which it is to be used, its course amounts to a taking under the 5th amendment, entitling him to claim compensation as upon an implied contract, of which this court has jurisdic-

tion concurrent with the Court of Claims for sums not exceeding $10,000. However, the plaintiff asks for no such relief, which would be in the nature of a suit at law, but has appealed to the equity side of this court for an injunction, upon the ground that his property is to be taken contrary to the Constitution as well as the particular statute under which the work is proceeding. It is well to note that the plaintiff does not assert, and in argument expressly denies that he intends to question the constitutionality of the flood control act. I construe his position as asserting that the defendants are proceeding in the face of both the statute and the Constitution. In this situation I do not think the Government, as such, can be or need be a party defendant. One test would be to answer the query as to whether it might in this identical proceeding, if it saw fit, file a cross-bill for condemning the property. It seems clear that it must be answered in the negative, for such an action would be necessarily controlled by the statutory provision for exercising the powers of eminent domain and could not be classed as a proceeding in equity. Of course, the motion, for its own purposes, admits the allegation of ownership of the property in plaintiff, and there is, therefore, no issue of title to be determined against the United States, which would make it a necessary party within the purview of decisions cited by counsel for defendants, such as United States vs. Clarke, 8 Peters 436; Hill vs. U. S., 149 U. S.. 593; Morrison vs. Work, 266 U. S. 481. This bill also necessarily admits the power of the Government to take the property or the rights thereon, which the project contemplates using as part of the floodway. The only effect of this suit is to restrain the officers charged with the execution of the works, which he alleges will consign his property to that use, until they have complied with what the plaintiff contends is the required procedure under the statute. Hence, I think it may be classed as in the

nature of a proceeding in ejectment or to restrain a trespass against the Mississippi River Commission and the individual officers named as defendants. See Belknap vs. Schild, 161 U. S. 18; American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94; Sante Fe Pac. R. R. Co. v. Lane, 244 U. S. 492; Waite vs. Macy, 246 U. S. 606; Hammer vs. Dagenhart, 247 U. S. 251; First National Bank of Canton vs. Williams, 252 U. S. 504; Fort Smith & Western Railroad Company vs. Mills, 253 U. S. 206; Street vs. Lincoln Safe Deposit Company, 254 U. S. 88; Tedrow vs. Lewis & Son Dry Goods Company, 255 U. S. 98; Kennington vs. Palmer, 255 U. S. 100; Kinnance vs. Detroit Creamery Co., 255 U. S. 102; Weed & Co. vs. Lockwood, 255 U. S. 104; Willard & Co. vs. Palmer, 255 U. S. 106; International R. Co. vs. Davidson, 257 U. S. 506; Hill vs. Wallace, 259 U. S. 44; Lipke vs. Lederer, 259 U. S. 557; Regal Drug Co. vs. Wardell, 260 U. S. 386; Chastleton vs. Sinclair, 264 U. S. 543. Plaintiff in substance charges that the conduct of these defendants has cast a cloud upon the title to his property which has and will deprive him of its value without due process and contrary to the fifth amendment. Under such circumstances the authorities abundantly support the right to make them parties defendant to such a suit as this. Noble vs. Union River Logging R. R. Co., 147 U. S. 165; Lane vs. Watts, 234 U. S. 525; Payne vs. Central Pac. Ry. Co., 255 U. S. 228; Payne vs. New Mexico, 255 U. S. 367; Sante Fe Pac. R. R. Co. vs. Fall, 259 U. S. 197; Baldwin Co. vs. Robertson, 265 U. S. 168.

"My conclusion is, therefore, that the Government should be dismissed from the suit.

"This disposes of the question of jurisdiction as well as the plea of misjoinder, which consists of the assertion that the suit is one against the Government and that the officers are without interest and hence improperly joined.

"We next take up the remaining specifications—want of equity and no cause or right of action.

"I shall dispose of the latter question first. At this point it is well to say that in the opening argument counsel for the defendants discussed and appeared to rely mainly upon the proposition that the Government has the right to impose the burden complained of upon the property of plaintiff as a matter of sovereign power, and the injury, if any, is so remote and consequential as to fall within the class damnum absque injuria. On the other hand, counsel for the plaintiff undertook to discuss the merits of the case as presented by the petition of whether the project amounted to a taking of property within the meaning of the fifth amendment. The court suggested that in the event it should decide the other points hereinabove considered, as well as the one of want of equity, were not well taken, it would not care to dispose of the important question of what constituted property or amounted to taking within the meaning of the law, except after a full hearing of the facts, one reason among others being that if it should err the result would be to have the case sent back after the delays incident to an appeal and thus unnecessarily impede the doing of the work. In other words, it was important that both the Government and property owners should know what their rights were at the earliest possible moment consistent with proper judicial consideration.

"From earliest times man has attempted to cultivate the rich soils in the valleys and on the banks of watercourses. From this struggle with the elements the rule evolved that everyone has the right to protect his property with dikes or levees to keep back such waters, without being responsible to his neighbors or to owners on the other side of the stream. It was recognized that they have the equal right to protect themselves by similar means. (See

discussion and citation of authorities by Judge White, in Cubbins vs. Mississippi River Commission, 241 U. S. 363-4.) On the other hand, there grew with the doctrine another of equal force, that 'the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors, in consequence of their right to enjoy the same, were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow or causing additional burdens by changing it.' The court reviewed the law, including the commentators upon the Code Napoleon, and quoted the maxim of the Roman law, 'Fluminis naturalem cursum non avertere.' (L. Cod. de Alluvionibus.)

"It follows that if the private individual who constructs a levee for the protection of his own property so long as he does not interfere with the natural flow of the stream is not liable to others for the effects thereof; neither is the Government, the State, levee boards, or other similar agencies who contribute to or assume control of such works for the benefit of the public. See Jackson vs. U. S., 230 U. S., p. 1; Hughes vs. U. S., ib. p. 24. It is well settled that Congress, under the commerce clause of the Constitution, has the right to authorize construction of improvements upon and in the navigable streams and water courses of the country in aid of navigation, so long as it is done without impeding or diverting the flow from the natural channel without liability for consequential damages or injuries to private property. Bedford vs. U. S., 192 U. S. 217.

"For a description in general terms of the situation now to be dealt with, no better statement could be made than that of Justice White in Jackson vs. U. S., 230 U. S., page 1, from which I quote at page 8 as follows:

"The valley of the Mississippi River may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean does not run through the center of the vast fertile and alluvial plains which in a comprehensive and generic sense constitute the delta of the Mississippi. On the contrary, the situation of the river in this respect varies, occasioned by the fact that at divers places the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and east banks. The west bank is divided into four great basins—the St. Francis Basin, which extends from Cape Girardeau to Helena; the White River Basin, which extends from Helena to the mouth of the Arkansas; the Tensas Basin, which extends from the mouth of the Arkansas to the mouth of the Red River; and the Atchafalaya Basin, extending from the mouth of the Red River to the Gulf. Practically in the long sweep from Helena, where St. Francis Basin ends and the White River Basin begins, to the ending of the Atchafalaya Basin at the Gulf there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country, having generally a very wide though varying expanse. The division into basins, putting out of view the St. Francis Basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi River or in the lower basins in part at least by the means of streams flowing independently of the Mississippi River to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, gen-

erally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo Basin, which, aside from peculiarities of its own, may be said to possess the same general characteristics as the basins on the west bank of the river. From Vicksburg, where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river, a different condition from that which exists on the west bank obtains.'

"By the act of June 2, 1879 (21 Stat., p. 37), the Mississippi River Commission was created and empowered to direct and complete such surveys of the Mississippi between the head of the Passes near its mouth to its headwaters, as was then in progress, and to make such additional 'surveys, examinations, and investigations, topographical, hydrographical, and hydrometrical of said river and its tributaries as may be deemed necessary by said commission to carry out the objects of said act.' It was further required to make report to Congress of any 'such plan or plans as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi river; improve and give safety to the navigation thereof; prevent destructive floods; permit and facilitate commerce, trade, and the postal service, provided that the commission shall report in full upon the practicability, feasibility, and probable cost of the various plans known as the jetty system, levee system, and the outlet system, as well as upon such others as they may deem necessary.' For the purposes mentioned an appropriation of $175,000 was made. Three years later, in 1882, the great overflow of that year, with considerable damage to the alluvial valley, occurred, and on March 1st Congress made an appropriation of $150,000 to furnish food for the destitute popu-

lation. 22 Stat. 379. In August, 1882, in the rivers and harbors bill of that year there was appropriated $4,000,000, to be expended from the head of the Passes to Cairo, but it was expressly stipulated that 'no portion of this appropriation shall be expended to repair or build levees for the purpose of reclaiming lands or preventing injury to lands by overflows: Provided, however, That the commission is authorized to repair and build levees, if in their judgment it should be done, as a part of their plan to afford ease and safety to the navigation and commerce of the river and to deepen the channel.' 22 Stat. 208. Thereafter provision was made from time to time to aid and assist the valley States and their subordinate agencies in the construction of levees. Many held to the theory that this would have the effect of increasing the flow, deepen the channel, and give more room for the outlet of flood waters according to the method used by Capt. Eads, who constructed the jetties at the mouth of the river. In the suit of Cubbins v. Mississippi River Commission, supra, the petitioner in that case, who also demanded compensation for alleged injuries to property from the waters of the Mississippi, assailed the 'Eads plan' in somewhat similar fashion to what we have heard of the more recent one. It will be noted that at the time Congress sought to make plain, at least in the beginning of the activities of the commission, that its purpose was to aid commerce, the postal service, etc., by the improvement of navigation, but expressly declared that the funds appropriated should not be used to reclaim lands or prevent injury by floods. This, then, appeared to be the definite policy of the Government. I have not the time or space to trace subsequent legislation to determine whether the change of policy came about gradually or not, but forty-five years later occurred the great flood of 1927, which in size, destruction of property (officially estimated at over $200,000,000), and loss of human life (also stated to have

been more than two hundred persons) outstripped anything that had gone before. As a result pressure was put upon Congress, through Representatives and Senators, not only of the States immediately contiguous to the Mississippi, but in others including those along its tributaries, to provide relief, because it so happened that in that year all of these streams, such as the Ohio, Missouri, Tennessee, Arkansas, White, and Red, were full to overflowing at approximately the same time. Finally, after a survey and report by the Chief of Engineers, which was printed as House Document No. 90, the act of May 15, 1928, was passed. That report of project also consisted of a review, from an engineering standpoint, of a number of plans for controlling the waters of the Mississippi River proper, or the volume to be dealt with under flood conditions from Cape Girardeau, Missouri, at the northern end of the valley, to the Gulf of Mexico. The Chief of Engineers recommended that all others, such as storage basins, controlled spillways, etc., be discarded, and that a definite plan, based upon the use of the three main basins, referred to as the nothern or St. Francis Basin on the west, the middle, including the Yazoo Basin on the east and the Tensas Basin on the west, and the southern or Louisiana section, known as the Atchafalaya Basin, be adopted. In transmitting this report, the Chief of Engineers said:

'2. The plan is a comprehensive one, providing for the maximum flood predicted as possible and for future expansion to meet changing conditions. It includes a spillway above New Orleans, diversion floodways in the Atchafalaya and Tensas Basins, a river-bank floodway from Cairo, Illinois, to New Madrid, Missouri, together with strengthening and a moderate raising of existing levees. It is designed to prevent any material increase in flood stages. Channel stabilization and navigation improve-

ment are included. Exclusive of rights of way, incidental drainage works, and damages, if any, recommended to be borne by local authorities, the estimated cost of flood-control works is $185,400,000, and of channel stabilization and mapping $111,000,000, a total of $296,400,000. The distribution of cost must be determined by law. The suggestion is made that a distribution by which the cost of flood-control works in general is borne 80% by the Federal Government and 20% by the valley States and the entire cost of channel stabilization is borne by the United States would accord with the fiscal policy of the President and precedents established by Congress. The reorganization of the Mississippi River Commission, Federal control over structures within natural floodways, and the comprehensive mapping of the alluvial valley are also recommended. Flood control of tributaries will be reported upon after the completion of surveys already authorized by Congress.

'3. The control of Mississippi floods by reservoirs is shown to be too costly to warrant their construction. Their development for local benefits is discussed. Other suggested schemes, including levees of sufficient height to contain the maximum possible flood, are discussed but found inadvisable.

'The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways. Its essential features and their functions are:

'Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin in the Red River, and from the Red through the Atchafalaya Basin to the Gulf of

Mexico. These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them.

'A controlled spillway to hold the levels down to safe stages at and near New Orleans.

'Local setting back of the levees in the main river at bottle necks to increase its carrying and reduce its flood heights.

'Greater protection against crevasses by strengthening the levee by reducing flood heights through the increased widths of channel afforded by floodways, spillways, and setbacks and by moderately raising the levees where needed to meet predicted flood stages.

'The progressive revetment of caving banks to protect the foundation of the levees and to stabilize the river both for flood control and navigation.

'Improved navigation channels for river traffic not less than 300 feet wide and 9 feet deep, to be obtained by dredging and training works where necessary between Cairo and New Orleans.

'4. The estimated construction cost of the complete plan is $296,400,000, and it can be advantageously executed in approximately ten years.

'5. The project recommended gives the maximum of results for the minimum of cost. It recognizes the interests and protects the rights of those who will be chiefly benefitted and of the taxpayers who furnish the funds. Complete flood control embodying the cheapest practicable reservoir system would be much more expensive.

'6. The plan heretofore pursued has been the construction of levees high enough and strong enough to confine all of the flood waters within the river channels. The levees that have been constructed are not sufficiently high for such floods as are now predicted. The cost of raising and strengthening them sufficiently to carry extreme floods would greatly exceed the cost of the plan proposed. Furthermore, the extent of the disaster which follows a crevasse increases greatly as the flood is forced to higher states by confinement wholly within the levee system. The loss of life and property in the recent great flood in the alluvial valley followed the breaking of the levees which reclaimed the land for the use of man. This reclamation had been pushed so far that insufficient room was left in the river for the passage of the unprecedented volume of flood water. The levees must be strengthened, but a halt must be called on further material increase in their heigths and the consequent threat to the inhabitants of the areas they are built to protect.

'7. Man must not try to restrict the Mississippi River too much in extreme floods. The river will break any plan which does this. It must have the room it needs, and to accord with its nature must have the extra room laterally. In its original state the river had only one low water channel until it reached the flat land near the Gulf, but in flood it overflowed an area 50 miles wide, which is really its natural flood bed. The water which can not be carried in the main channel with the levee at reasonable height must be diverted and carried laterally. Some additional capacity can be obtained in the main river by local setbacks of the levees. As a general setback is not prac-

ticable, the remainder must be supplied by floodways paralleling the general course of the river.

'8. The plan recommended provides the requisite space for the passage of floods, and levees of adequate strength to withstand them, so that should a flood recur of the magnitude of the flood just experienced, the maximum of record, it would be passed out to the Gulf without danger to life in the alluvial valley and without damage to property except in the floodways allotted for its passage. Controlling side levees limit the area of the floodways and protect land not in the floodways where such protection justified its cost.

'9. Should Divine Providence ever send a flood of the maximum predicted by meteorological and flood experts as a remote possibility but not beyond the bounds of ultimate possibility, the floodways provided in the plan are still normally adequate for its passage without having its predicted heights exceed those of the strengthened levees. It is designed to be both simple and comprehensive, flexible and adequate to prevent a calamity such as that of 1927 from happening again as a result of any flood past or predicted. It is capable of modification or expansion, if desirable, to further accommodate an increasing population and its property.'

"This plan or project was adopted by Congress in the flood control act, subject to revision by a commission to be appointed by the President, which was authorized to consider the 'engineering difference between the adopted project and the plan recommended by the Mississippi River Commission in its special report, adopted Nov. 28, 1927 * * * and to recommend to the President such action as

it may deem necessary to be taken in respect to such engineering differences, and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief and in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: Provided, That all diversion works and outlets constructed under the provisions of this act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: Provided, further, That, pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in any wise interefere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river.'

"Three hundred and twenty-five million dollars were authorized to be appropriated instead of $296,400,000.00, recommended by the Chief of Engineers.

"In section 2 of the act, Congress, instead of adopting the suggestion of having the States contribute twenty per cent of the cost of the work, estimated that they had already spent $292,000,-

000.00 for like purposes, and declared this to be a 'full compliance' with the principle of local contribution and that 'no local contribution to the project herein adopted is required.'

"In section 3 it was further provided that no money should be spent under the act 'until the States or levee districts have given assurance satisfactory to the Secretary of War that they will maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and local repairs to main levees; (a) agrees to accept land turned over to them under the provisions of sec. 4; (c) provides that without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the head of the passes.' (Underscoring by the author of this opinion.) This section further provides:

'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either

the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.'

"I quote in full section 4:

'The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

'The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and Chief of Engineers are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War, is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the river and harbor act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: Provided,

That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.' (Underscoring by the author of this opinion.)

"I also quote that portion of section 8 which is deemed pertinent:

'The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems.'

"It will be observed that the policy of Congress in the late 70's and early 80's, when the Mississippi River Commission was created and began to function, and during which many of the cases cited and relied upon by the Government arose, was entirely different to that disclosed by the act of 1928. As above stated, at that time the purpose was to aid commerce, benefit the postal service, etc., by improving navigation under the grant of power found in section 8 of Article I of the Federal Constitution, with a distinct declaration that money should not be expended for reclamation or preventing floods; whereas, in its latest action, the very bill

itself is entitled: 'An act for control of floods on the Mississippi River and its tributaries and for other purposes.' It could no longer withstand the demand for protection to the enormous property values and population of the valley or decline to assist in retaining the lands which had been 'reclaimed' from the original 'natural bed' of the river, which, the Chief of Engineers says, in its primal state, had a width of some fifty miles. It is scarcely to be expected that anyone will ever question the constitutionality of this expansion of purpose—certainly not those States and persons who are to benefit by protection from the destructive forces of the great river.

"I do not deem it necessary to discuss at length cases construing the police power, as distinguished from those of eminent domain, for Congress appears, by the provisions of this statute, to have recognized that in benefiting and protecting some of the citizens it had to do so at the expense of others, for the simple reason that all could not be included. Strictly speaking, the Federal Government has no police power, although in carrying out some of its delegated authority, such as the control of navigation, it exercises powers analogous to the police powers of the State. C. J. Vol. 12, 910, verbo. 'Constitutional Law,' sec. 417. It is true that the second paragraph of section 3 declares that 'no liability of any kind shall attach to or rest upon the United States for any damages from or by floods or flood waters at any place * * *,' but it adds a proviso, directing the payment for such injuries to property as the Government could not have been held liable for under decisions like that of Gibson vs. U. S., 166 U. S. 269, and Bedford v. U. S., 192 U. S. 217. And immediately follows section 4, above quoted.

"This latter section seems to contemplate that the rights thus to be 'furnished' shall be paid

for, as in the very next paragraph the machinery and procedure for acquiring by condemnation, such as 'in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project * * *' is established.

"The statute does not make clear what is meant by 'flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the river.' However, heretofore it has been the object of the Government, as well as of the States and subsidiary agencies, at all times, to keep the waters of the river in its main channel. It was only on occasions when this could not be done that they broke through and flooded property situated like that of the plaintiff. The Chief of Engineers and the War Department seem to construe the provisions of section four as applying only to conditions like those in the New Madrid area, where existing levees are to be lowered and used as a secondary 'defense', while the higher or protecting embankments are placed further back. They contend, as I understand it, that in the Tensas or Boeuf River Basin as well as the Atchafalaya, because existing levees will not be altered, and these areas will not be flooded until the waters of the main river reach a height where it would happen anyway under conditions existing when the act was passed, no protection is being taken away from property there; hence no additional water will be diverted. This, however, leaves out two considerations which Congress may have had in mind; First, that these areas were being deprived of such measure of safety as had been enjoyed by the possibility that the levees might break in some other locality, either as a result of their greater vigilance or a fortuitous event, thereby permitting them to escape; and, secondly, when the fuse plugs do go out they will doubtless be washed out to the level of the surrounding land or deeper, and this property will

be required to bear the burden, not only of its own share of the overflow waters, but, in addition, all of that which would otherwise cover the protected areas.

"Is the construction of the Chief of Engineers the reasonable common-sense meaning of the language of the act, or is it more reasonable to assume that Congress viewed the adopted project as a departure from the previous methods of trying to keep all of the water in the main channel, and as in effect the dedication of these floodways to the duty of performing the service which the constantly rising levees had done in the past.

"Congress, in a general way, at least as to engineering features, purported to adopt the project of the Chief of Engineers, but, as above pointed out, disregarded some of his recommendations as to the bearing of the expense, etc. However, the comparatively slight increase in the appropriation from $296,400,000 to $325,000,000 would appear to be inadequate to cover the cost if persons situated like the plaintiff are to be paid and they have or may suffer injury to their property proportionate to what he claims. One can not help but be impressed that the act as finally passed was an unskillful compromise, first, between those claiming that the state should bear a portion of the burden as against others insisting that the Government pay the whole cost, and, secondly, those demanding that all injury suffered by property owners in the floodways should be compensated, while others contended that the Government should not be made responsible for anything except property actually taken and to be occupied by the levees and other work contemplated by the project. It is a matter of common knowledge that action by Congress was delayed for some time as a result of disagreement and discussion with the President upon some of the points. However, it can not be denied that in so far as there

will be a diversion of the waters of the main channel of the river and a directing of their course to the sea through these limited floodways or channels, property owners situated therein are called upon to suffer whatever losses may be entailed for the good of those whose protection is contemplated under the plan; and while the Government may, for the purposes of commerce and navigation, construct levees and other works or improvement upon the banks and in the channel of streams without liability to those who may suffer consequential damage, yet if the work in contemplation in this instance is not for such ends, but mainly for the benefit of other private property, then does there not arise in bar of that course the inhibition of the Constitution that private property shall not be taken for public purposes without just compensation? The allegation that the War Department has not paid and does not intend to pay for the injuries claimed by plaintiff is, of course, admitted by the motion to dismiss. If the plaintiff's property and that of others similarly situated will be compelled to bear the burden of additional flood waters, and the defendants are proceeding in disregard of such rights and the method for acquiring them laid down by the act, then clearly they are ignoring the statute and under well-settled principles can be stopped by a court of equity until they comply with the law. Corpus Juris Vol. 20, pp. 838-9, verbo 'Eminent Domain,' and authorities cited in the footnote.

'Failure to institute proper proceedings. An owner may obtain an injunction to restrain the taking or injury of his property, although such taking or injury is for a public purpose by one possessing the power of eminent domain, where such taking or injury is sought to be accomplished without the institution of condemnation proceedings.' Ib. 1172, sec. 533 e, and authorities in footnote.

"If the rights sought to be used are within the protection of the statute, the latter lays down the means for obtaining them and fixes the time when the Government shall be authorized to go into possession—that is, after filing a suit for condemnation and providing funds or securities to pay the owner, as directed by the court. The statutory method excludes all others except of course amicable settlement with the owners. However, this does not prevent entry for the purposes of examination and survey. C. J. vol. 20, p. 839.

"The report of the Chief of Engineers states, speaking of the Mississippi, that 'its alluvial valley has a growing population and contains the largest area of the richest land in the United States,' (par. 46). He also calculates that, 'in the absence of protecting works,' 30,000 square miles of the valley would be flooded in high water, but with the construction of the proposed system of levees and floodways approximately 20,550 square miles 'will be protected annually. The remaining 9.450 square miles, of which approximately 3,340 square miles is cleared land, will be protected on an average of two years in three and fourteen years in fifteen, depending upon its location. The remaining 6,110 square miles is swamp and timberland, which is not injured by the flood.' (Par. 23.) He also states that the estimated cost of $296,400,000 does not 'include the costs of rights of way nor possible damage to structures which have invaded the flood bed of the river.' (Par. 24.)

"After calculating or estimating the period during which the land in the floodway will be overflowed, and pointing out the opportunities which will remain for cultivation, he says (speaking of the necessity for the use of lands situated like those of plaintiff):

'Any other use made of these areas must be subject to the higher use for the general con-

trol of the river. No curtailment of their (the floodways) area should be permitted which will run contrary to the protection of life in the large cities and the uninterrupted cultivation of the great areas that will be permanently protected by the plan.'

"This, of course, demonstrates the certainty that at some time the property within the floodway will be overflowed by the surplus waters of the Mississippi River, and the owner's use and occupancy is subordinated to that purpose. When or how often no one save Providence can tell. It is true that, based upon past experience, the Chief of Engineers estimates that it will not occur oftener than above indicated, depending upon the location of the property, but necessarily these figures are at best estimates or prophesies. Would anyone under such circumstances feel justified in placing improvements thereon of a valuable or permanent character when he knew that at some time, by express design and inescapably, they would be destroyed by the great volume of water that is to be directed through these channels? Some of the property owners, like plaintiff, no doubt are small farmers, and it would be quite a hardship if they were compelled to acquire other property outside the floodway—in some cases five to ten miles away—upon which to build their homes, farm buildings, etc., necessary to the cultivation of their lands within the floodway. The 'maximum possible' estimate of the Weather Bureau and the 'maximum probable' estimate of the Mississippi River Commission of the volume of water that will pass down the valley at Arkansas City, as well as at the mouth of Red River, is fixed at approximately three million second-feet. It is proposed under such conditions to divert through the Tensas or Boeuf River Basin something less than one million second-feet, or about one-third, practically all of which will

again return to be dealt with at the head of the Atchafalaya. From the latter point the plan contemplates that all in excess of 1,500,000 second-feet, or approximately one-half of the total, will be then turned down the Atchafalaya Basin. Thus appears the menace under which anyone would labor who attempted to live in and cultivate the beds of these floodways. The Chief of Engineers is probably correct when he states that sufficient warning could be given to enable them to flee and save the lives of themselves and their livestock; but what would become of their crops and improvements, and what condition would their property be left after the water had gone down?

"In their supplemental brief counsel for the Government laid much stress upon decisions of the State court to the effect that the State, prior to the constitution of 1921, was not required to pay for property taken for levee purposes. But, as pointed out in Eldridge vs. Tresvant, 160 U. S. 452, this was because of the servitude imposed by the civil law upon the property of a riparian owner, compelling him to contribute, without compensation, space for levees and public highways. They can have no bearing on a situation like this where the structures are in some places fifty miles inland and intended to provide a floodway for waters diverted from the main channel in the State of Arkansas. Besides, it is alleged that these works are designed to hold the water upon plaintiff's property and not for its protection.

"It is also contended that the Government may avail itself of all the powers of eminent domain of the State, but in Kohl vs. United States, 91 U. S. 274, it was said:

'If the United States has the power (of eminent domain) it must be complete in itself. It can neither be enlarged or diminshed by the

State. Nor can any State prescribe the manner in which it must be exercised.'

"I have, of course, gone somewhat into the merits of the case, but only so far as seemed necessary in passing upon the exception of no cause of action and to more clearly illustrate the view I entertain that its very nature takes it without the class which is controlled by the maxim 'damnum absque injuria.' In doing so I have attempted to confine my discussions to the allegations of the petition, the report of the Chief of Engineers as representing the express purpose of his department upon the questions involved, and such other well-known facts and conditions as any court might notice judicially.

"My conclusion is that the petition does allege a cause and right of action, as well as grounds for the intervention of a court of equity, if they can be supported by proper proof upon the trial. For the reasons assigned the motion to dismiss will be overruled. **Rendered, August 13, 1929.** ***35 Fed. (2nd) 235.***

OPINION ON THE MERITS.

"Dawkins, J.:

"In the former opinion rendered in this case on the motion to dismiss, for the reason that the petition disclosed no cause or right of action, the court reviewed the allegations of the bill of complaint at length. (35 Fed. (2nd) 235.) The Government was dismissed as an unnecessary party, but otherwise the motion was overruled and the remaining defendants, the Secretary of War, Mississippi River Commissioner, Chief of Engineers, and subordinate officers thereafter answered, putting at issue the material allegations of the petition. The case has now been submitted upon its merits.

"The record shows that complainant owns one hundred and sixty acres of land within the Boeuf Basin, between the east guide levees contemplated by the adopted plan for flood control and the hills on the west bank of the Ouachita River. This property, together with the buildings and improvements thereon, is worth under normal conditions, about $9,000.00, and while the complainant does not reside on it personally, he cultivates about one hundred and twenty acres thereof, with the assistance of his father and brother. There is attached to this opinion a copy of a map showing the proposed locations of the levees along the Boeuf Basin, from which it will be seen that the property involved lies about midway between the guide levees on the east and the hills on the west, which are from ten to twelve miles apart. The west guide levee will end just below the city of Monroe, which is some forty miles northwest of complainant's land, while the one on the east will extend a few miles south of his property. From the end of the east guide levee south to the vicinity of Bayou des Glaises in Avoyelles Parish, the area between the levees on the west bank of the Mississippi River and the hills west of the Ouachita River, except for the high ground of Sicily Island, will be left exposed to the waters of the Boeuf Basin, Bayou Macon, and Tensas River, as well as the back waters of the Ouachita and Black Rivers. There is a ridge or strip of high land known as Macon Ridge, which begins in Chicot County, Arkansas, and extends south into and through Louisiana, passing in the vicinity of the town of Delhi, to a point near Sicily Island, in Catahoula Parish. This ridge separates the valleys of the Boeuf and Tensas Rivers, which converge below the end of Macon Ridge and several miles south of the lower end of the east guide levee. The hills on the west bank of the Ouachita come up to the water's edge in the locality of Harrisonburg, Louisiana, and between this point and the south end of

Macon Ridge is situated a circular-shaped elevation of appreciable area, called Sicily Island, which impedes the outflow from the Boeuf Basin. The result is that while this basin has an average width of about fifteen miles, it spreads out toward the south end to probably twenty miles but closes in at Sicily Island with outlets on either side thereof, which are only a few miles in width. This condition at present causes back water to accumulate in the area immediately south of complainant's property, and will continue to do so after construction of the proposed guide levees. When the Mississippi reaches such a stage that the fuse plug levee just below Arkansas City will break, under the plan, about one-third of the total volume of water passing that point at the time will be turned down the Boeuf floodway and into the area just described.

"In a general way, the adopted project, commonly called the Jadwin plan, contemplates diverting from the Mississippi River in the vicinity of Cairo, Illinois, sufficient water to insure that the main channel will carry the remainder safely to the mouth of the St. Francis River. The water so diverted will be carried through a by-pass or floodway to a point near Helena, Arkansas, where it will return through the mouth of the St. Francis and join that coming down the main river. From Helena south the levees on the west bank of the Mississippi will be maintained at sufficient height to hold all of this water to a point about twelve miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi about midway between the lower end of the levee on its west bank above mentioned and the mouth of the Arkansas. Lying between these levees to the north and west of the twelve mile gap will be located a pool or basin for back-water of some twelve hundred square miles, into which will be poured all of the waters of

the White and its watershed, as well as the overflow on the north bank of the Arkansas for a distance up stream to the locality of Pine Bluff. It is not contemplated that levees will be built along this stretch of the Arkansas River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the twelve-mile gap above described. This combined volume will be added to that in the main stream of the Mississippi, which as previously shown, will consist both of its own waters brought down from Cairo and the quantity which will have returned from the St. Francis Basin at Helena. Then for a few miles the Mississippi, which will have a width between the levees on either side of approximately four miles, will carry it all until it reaches the fuse plug levee below Arkansas City.

"The expression 'fuse plug' was coined no doubt because of the fact that, in operation, this stretch of levee will break, or be washed out, when the river reaches a predetermined height of sixty and one-half feet, in similar fashion to what happens when a current of electricity attains a designated voltage sufficient to blow out the fuse in electrical machinery. It simply means that the levees above and below this stretch of about twenty miles will be strengthened and raised approximately three feet higher than the fuse plug and when the water in the Mississippi reaches sixty and one-half feet it will begin to flow over. It is contemplated that this will cause a crevasse through the fuse-plug levee, which will gradually widen to include the whole of twenty miles if the condition of the Mississippi requires. The former Chief of Engineers, and author of the project, stated in his examination before the Flood Control Committee of the House of Representatives, that the soil of this piece of levee would be softened with sand or otherwise to be sure

that it would break without undue danger to those above and below, although the Government's chief hydraulic expert in his testimony in this case stated that he did not so understand the purpose.

"With a flood at the maximum contemplated by the plan, the quantity of water passing down the Boeuf Basin, it is estimated will be between 900,000 and 1,250,000 second-feet, with the result that complainant's property as well as all other lands therein will be submerged. The depth, of course, will vary according to the conditions and stages of water in the Mississippi, the Tensas, Black, and Ouachita Rivers, at the time, but may reach a maximum of approximately 16.4 feet on the plaintiff's land. In the opinion of some of the engineers, the velocity will not be very great but will be sufficient to destroy the buildings and improvements in the floodway which are not anchored to the ground. The duration of the water upon these lands will also depend upon conditions prevailing in the lower Mississippi Valley, including the Ouachita, Black, Red, and Atchafalaya Rivers, but will probably be from thirty to sixty days. The high waters of the Mississippi and its tributaries usually come in the spring of the year, and the question of whether the lands in this floodway may be cultivated after the waters have passed off will depend upon the time at which the break occurs as well as the conditions just mentioned. If it should be in the late spring, say about the first of May, and the water should remain for sixty days, it would be somewhere between the first and middle of July before the plaintiff and others similarly situated could begin cultivation. By the time their improvements sufficient to enable them to plant were restored, it would be too late in the season to raise anything except late corn and forage crops, for the staple crop of cotton could not be planted with an reasonable hope of success. It is true that plaintiff and others as far from the fuse-

plug levees would have time to move their livestock, household furniture, and farming implements out of the path of the flood, but of course the opportunity for fleeing to high ground would diminish in exact proportion to the nearness of the land to the point of the levee's breaking. It is well known that in a large part of the area between the guide levees of the Boeuf Basin, as well as below where the levees end to the Bayou des Glaises section, livestock is allowed to range in the woods and swamps to such extent as would require several days to herd and drive them to safety.

"Contrasted with these conditions with which plaintiff and others within the floodway will have to deal, those fortunate enough to own property behind the levees will be fully protected, including their improvements, livestock, etc., and can pursue their farming and other activities in perfect safety. Those within the floodway will live under a constant menace, for no one can tell in what years meteorological conditions will require the use of their lands for the purpose intended by the plan—i. e., a floodway. The Government engineers estimate that this will probably not happen more than once in twelve years, while evidence offered on behalf of the plaintiff tends to indicate that in the light of past experience it might occur once in every four or five years.

"However, as pointed out in the former opinion in this case, there is no escape from the proposition that the complainant's property and that of all others similarly situated, will be, by express design of the plan, compelled to bear the whole burden whenever the necessity arises. The act itself (sec. 9) specifically makes secs. 14, 16, and 17 of the rivers and harbors act of 1899, applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this act (the flood-control act) which will prevent

any interference with the carrying out of the plan and purposes of the act of May 15, 1928. This was done, no doubt, because of the recommendation of the Chief of Engineers, in Document No. 90, referred to as the adopted project, that the Federal Government should have complete control over these floodways. It is likewise beyond question that all those portions of the valley which have been heretofore subjected to the overflow waters of the Mississippi and its tributaries, which the plan is designed to protect, will be entirely relieved and the waters which they might otherwise receive will be carried to the sea, either through the main channel of the river or through these proposed floodways.

"Referring now to the flood-control act, in sec. 4 it is provided:

> 'The United States shall provide flowage rights *for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River* * * *" (Italics by writer of this opinion.)

"If the conditions which the carrying out of the plan will produce results in a diversion through the Boeuf Basin floodway of 'additional flood waters * * * from the main channel of the Mississippi River' within the meaning of this provision, then clearly the statute requires that the 'Government shall provide' these 'flowage rights' and all question as to how they were to be 'provided' was removed by the proviso which immediately follows: 'That in all cases where the execution of the flood-control plan here adopted results in benefits to property, such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.' That is, they must be acquired by purchase or condemnation as elsewhere provided in the act.

"Now, the record shows that during the time preceding 1927, for which there are any reasonable

figures, the quantity of water passing down in the vicinity of the proposed fuse-plug levee, into both the Boeuf and Tensas Basins, were as follows: In 1913, 137,732 second-feet: in 1916, 335,814 second-feet. What is known as the Cypress Creek outlet from the Arkansas River was closed by the State of Louisiana, with the consent of the War Department about 1921 and 1922, although the waters of that river and the Mississippi reached stages which would have sent them through that point without the levee, none came down these basins. Then, in the flood of 1927, it is estimated that a total of 600,000 second-feet flowed through the Boeuf and Tensas Basins combined, of which 450,000 second-feet went down the former, all of which came from crevasses on the south bank of the Arkansas. Under the proposed plan, the entrance to the Tensas Basin at its head is to be closed by the guide levees, and all the water which will escape through the fuse-plug near Arkansas City will be diverted down the Boeuf Valley; hence the Tensas area will be fully protected in the future, except from the waters within its own watershed, which will be relatively insignificant. Likewise the quantity that comes down through the Boeuf Basin from its own drainage, when unaffected by overflow waters of the Arkansas and Mississippi, is unimportant. In the past some water from crevasses on the Arkansas have flowed further west into Bayou Batholomew and down the Ouachita, thus relieving the Boeuf Basin until it returned south of the city of Monroe. In none of these small river basins would there be any occasion for concern from their own waters except in the lower sections where the country is affected to some extent by backwater from the Ouachita, Black, and Red Rivers, or from water entering through crevasses in the Mississippi between the northern end of Macon Ridge and the mouth of Red River.

"As stated in the former opinion, the flood-control act does not define what is meant by 'addi-

tional flood waters.' But even if we give these words the widest interpretation, without consideration for the fact that the waters to be diverted will be confined to a limited channel, it is proposed, as above shown, under the maximum flood conditions, to discharge from the main stream of the Mississippi through the Boeuf floodway from 900,000 to 1,250,000 second-feet of water, whereas it appears, according to the most reliable figures obtainable, not more than 600,000 second-feet have ever before passed down the Boeuf and Tensas combined, of which 450,000 second-feet went through the former. Unquestionably, it would seem to the extent that the waters which would go through the Tensas, under present conditions, will be diverted through the Boeuf floodway (and it was conceded by the Government's chief expert engineer) this will be a diversion of additional waters.

"As a result of the examination of the Government's chief experts I gather that the contention of the War Department is, because the levees upon the main stream of the river will be raised several feet and there will be no breaks or crevasses at any point except those designed for floodways, and the capacity of the Mississippi otherwise will be increased so that it will carry a greater volume than ever before, there will actually be less water diverted or escaping from the river than has been the case in the past. For this reason they say there will be no diversion of additional waters. However, I can not conceive that Congress had any such idea in mind when it inserted the provision now under consideration. Besides the estimated 600,000 second-feet which came into the Boeuf and Tensas Basins from crevasses in the south bank of the Arkansas River in 1927, at about the same time another occurred on the east bank of the Mississippi at Mounds Landing, approximately opposite the proposed fuse-plug levee, and through which it is esti-

mated 500,000 feet of water also escaped into the basin of the Yazoo River in the State of Mississippi. The underlying theory of the adopted plan is that the main channel of the river shall be relieved of its excess waters at flood stage by diverting them through definitely determined channels. This, of course, means that all of the water which has gone out of the Mississippi in past overflows at all points, or at least such as will escape under the improved and strengthened levees of the present plan above what it is deemed safe for the main river to carry, will have to flow through these diversion channels. Certainly, to the extent that the lands in the floodways will receive more water than ever before if destructive, they will bear a greater burden within the meaning of the act.

"It is also contended on behalf of the Government that because the Boeuf Basin, prior to the closing of the Cypress Creek Gap on the south bank of the Arkansas, was overflowed from that source on an average oftener than it is calculated the stages of the Mississippi will blow out the fuse plug, that the area to be used for the floodway will actually receive less water, when probable frequency is considered. However, as pointed out heretofore, this stretch of levee on the Arkansas River had already been built and afforded the same protection comparatively as any other major levee on either the Mississippi or Arkansas. I think it also reasonable to say that Congress had in mind the conditions as they existed in 1927, and with which they were dealing in the act of May 15, 1928. They were attempting to formulate a comprehensive system as outlined by the document, No. 90, and realized that they were giving full protection to about two-thirds of the area of the Mississippi Valley, which had theretofore been subjected to the menace of overflow under the old system and that as a consequence, certain sections of the valley, which were to be devoted to the purpose of spillways, would be com-

pelled to bear the whole burden for the benefit of protected lands.

"It seems also to be one of the theories of the defense that inasmuch as the height of the levee to be used as a fuse plug will not be lessened, and the waters of the Mississippi under present conditions would overtop this point when it reached 60½ feet, no protection is being taken away from property owners in the Boeuf Valley; hence they should receive no compensation for the use of their lands to carry the excess water above that height. I do not believe that any such narrow construction is justified by the language of the law, for to the extent which the property of the complainant and others similarly situated will be taken for the purposes of the floodway, to aid navigation of the river and to protect the lands of other persons, the same will be done in the public interest, and to the extent that he and they will be deprived of the unhampered control, possession, and use of their land, just to that extent will their property be confiscated. Of course, so long as their lands along with those of all other property owners in the Mississippi Valley were subject to the uncontrolled action of the elements and were dependent upon the strength or weakness of the constructions upon the main stream of the river, they were in no greater danger and were compelled to bear no heavier burden than anyone else. But when the Government departed from the policy of building levees and other public works for the purpose of commerce and navigation alone and expressly entered the field of controlling floods for the protection and reclamation of private lands, then it became engaged in activities which make it responsible for the invasion of private rights. It will not be assumed that Congress intended to violate the fifth amendment to the Constitution by taking private property for public purposes without just compensation.

"There is a universally recognized principle that the owner of property subject to overflow waters of either navigable or nonnavigable streams is entitled to have them continue in their natural state 'without burden or hindrance imposed by artificial means and no public easement beyond the natural one can arise without grant or dedication, save by condemnation with appropriate compensation for the private right.' (U. S. *vs.* Cress, 243 U. S. 231.) This doctrine has had its application usually in cases where the property was situated upon or near the particular stream whose waters were affected by the acts of man; but mere size or magnitude of the condition with which we are dealing can not alter the principle. All of the property within the range of the overflow of the Mississippi in its natural state, and before construction of levees or other works for confining it to the main channel, was by virtue of its location, charged with the burden of receiving those waters at flood time in such manner and to such extent as nature had provided. It is equally well settled, as shown in the previous opinion in this case, that every one so affected had the right to build levees or dykes along the banks of the stream to keep the water off his own property, without responsibility to those above or below or on the other side, so long as he did not change or impede its natural course. Therefore, merely because of the fact that these levees, as they were increased in height and extended throughout the length of the Mississippi, were unable to hold the river within its channel at flood stages, did not change the legal situation. The water continued to seek the weakest spot, as expressed by the engineers, and when it was found followed the course of nature just as in the original state of the river. There was under these circumstances no artificial condition created by which the waters should designedly flow over specific lands. However, in the case before us, the very basis of the plan is that by strengthening and in-

creasing the height of the existing levees, the excess water shall be diverted over property, within the floodways. In other words, the whole scheme is one for artificially controlling the waters of the whole valley so as to divert them through these channels at flood stage. And this is true notwithstanding the beneficient purpose for which the project was conceived.

"I think it reasonably clear that when the plan is completed the property within the floodways can be cultivated in most years, but always, of course, with the knowledge that a flood may come and cause the owners or operators to suffer serious loss. However, these are elements going to the amount or value to be paid for the rights; for the act clearly indicates that the Government may acquire, either in fee simple the lands desired, or merely a servitude or right of flowage in those cases where nothing more is needed.

"It is admitted that the defendants do not contemplate prosecuting any proceedings for the condemnation of flowage rights through the Boeuf Basin, or that they will endeavor to acquire them amicably from the owners. Under the view they have taken of the law, they could not have followed a different course. It also appears that the surveys and other works of the engineers, including the location of the levees and the proposed construction of the fuse plug at the head of the floodway in Arkansas, has, for the present at least, affected materially the sale and mortgage value of property between the proposed levees which will be subjected to the flood waters passing through. This may be to some extent a psychological condition, but it seems real enough to those most affected.

"The act, in Section IV provides that when the Secretary of War wishes to acquire 'any lands, easements or rights of way * * * needed in carrying out this project,' he shall institute proceed-

ings in the United States district court where the same are situated, if unable to agree with the owners as to price; but if he desires to take possession and begin work before the issue of value is determined, he may do so upon showing that the money to pay for such lands, easements, or rights of way has been made available to the satisfaction of the court. Of course, the physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to that service and the taking possession in so far as is either necessary or contemplated by the act will begin with the construction of the first levee or works which are intended to direct the water upon the land. No other character of possession seems reasonably to have been contemplated in any case where 'flowage rights' or rights of way as distinguished from lands were to be acquired, than that which flows from the construction of the works. When they will have been complted the appropriation will be complete. It can not be that if the owner is entitled to compensation he must wait until an overflow comes. Under the law of this State, unqualified ownership of property includes the usus, fructus, and abusus, or the right to possess, enjoy the fruits, and dispose of the whole in the most unrestricted manner. R. C. C. Arts. 491; 490; 493. When either of these is taken away or diminished, to that extent does the owner lose a part of his property, or which is the same, the elements that constitute ownership. (See Ambler Realty Co. *vs.* Village of Euclid, 297 Fed. 307; Buchanan *vs.* Wurley, 245 U. S. 60; Pumpelly *vs.* Green Bay Co., 13 Wall., 166; United States *vs.* Welsh, 217 U. S. 333; Boston Chamber of Commerce *vs.* Boston, 217 U. S., 189; Tucker *vs.* U. S., 283 Fed., 428.)

"My conclusion is that the act requires the Government to pay for the rights which it seeks to exercise over plaintiff's property, and in so far as the defendants are proceeding without complying there-

with, they should be restrained." Rendered, Dec. 13th, 1929. *37 Fed. (2nd) p. 602.*

REASONS FOR NOT GRANTING WRIT.

In addition to authorities cited by Judge Dawkins in the two opinions set forth, we especially call the Court's attention to the case of ***Philadelphia Company v. Stimson, Secretary of War, (p. 605, vol. 223 U.S.)*** **which expressly holds that exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunctive process.**

The express purpose of the bill in this case is to prevent Officers of the United States from illegally carrying out a law and also from illegally violating a provision to the Constitution of the United States; to-wit, the Fifth Amendment.

It is admitted in this case that the United States Government has advertised for and received bids for the construction of certain parts of the work to be performed in the Boeuf Basin in carrying out the terms of the adopted project given in the act approved May 15, 1928.

It was further agreed that the relief asked by the complainant in this case is and shall be confined solely to the construction in the Boeuf Basin within the district of the court where the suit is pending, and that no attack is made upon the adopted plan as such. (See p. 29 of Record under the heading "Stipulation".)

Reasons assigned by petitioner for granting the writ are not sufficient and are not borne out by the facts.

The first reason in which petitioner states that the Boeuf Basin, like the Atchafalaya Basin, has always been subject to flooding, in the event of overflow from the main channel of the Mississippi River, is a question of fact.

This Court does not grant certiorari to review evidence and discuss specific facts, ***(U. S. v. Johnston, 268 U. S. p. 227)***. As a matter of fact, the record shows that, since the closure of the Cypress Creek gap which was effected in 1919 and 1920, with the consent of Chief of Engineers of the United States and under the supervision of the Mississippi River Commission, the Boeuf basin has had equal protection from overflow with the rest of the valley and has not since been flooded from the waters of the Mississippi River, although it was inundated in 1927 from breaks in the levees on the South bank of the Arkansas River. (See pp. 48, 62, 78 and 80 of Record.)

The record further discloses that the greatest volume of water ever passing through the Boeuf Basin was in 1927, and was 450,000 cubic feet per second (pp. 78-103 of Record). The adopted plan will divert from the Mississippi River and into and through the Boeuf basin from 900,000 to 1,200,000 cubic feet per second, and where Kincaid's property was overflowed in 1927 to the extent of about 4 feet, when the adopted project is put into effect, it will place 16.4 feet of water over his property. (See pp. 83-105 of Record.)

The statement that since the levees now existing along the main channel of the Mississippi River which protect the Boeuf Basin are not to be lowered or impaired, so that under the proposed plan the Boeuf Basin will continue to have the same levee protection it now has, is not borne out by the facts.

The record shows that the main levee on the Mississippi River will be raised approximately three feet until it reaches the Boeuf Basin and for a distance of 35 miles will be left lower than the main levee, so that water may escape through this lower portion of the levee, or what is called the fuse-plug, and be diverted from the main river and pass through the designated diversion channel, and that this water will be additional destructive flood water.

The fact that the War Department has never considered that the United States is required, either under or apart from the Flood Control Act, to condemn or acquire flowage rights over lands such as the respondent's land, and no provision has been made, financially or otherwise, for such condemnation or acquisition, is no reason for granting a certiorari in this case.

This diversion channel is specifically set apart in the adopted plan as a diversion channel, and guide levees are provided on each side of same to show its dimensions. The Government is paying for the guide levees and having same constructed and when these guide levees are constructed respondent's property will be taken.

The fact that the Engineers representing the War Department are of the opinion that they can acquire the

property of individuals in this basin for nothing, can have no weight; in fact, if Congress had so provided, such an act would have been unconstitutional.

The fact that there are approximately four million acres of land located, with respect to contemplated diversion channels, similarly to the respondent's land, is no reason why the Government should confiscate same and apply same to public use without just compensation; and the fact that, if these millions of acres of land were condemned by the Government it would cost a large sum of money, is no reason for confiscating private property for public use without just compensation, but is the greater reason why the Government should be required to pay for same, as they are all privately owned lands.

The statement that the decision in this case has suspended the carrying out of the plan in the Boeuf Basin is not true. If this statement of fact should be true, it is solely because the Government or the representatives of the Government desire to obtain this property and make use of same for public purpose without compensating the owner therefor.

There is no way the Government can be delayed in carrying out this plan, if they proceed lawfully; that is, acquire the property by condemnation or purchase. If they acquire same by condemnation, under the Federal Statute they have the right to immediate possession by alleging that a specific appropriation had been made to pay for same, or by depositing an amount equivalent to the value of the property with the Court while the condemnation proceedings are pending.

The determination of the questions presented in this case is not a matter of the greatest national importance.

This is not the first instance where the Government has attempted to violate the Fifth Amendment to the Constitution of the United States and confiscate the property of its citizens. The Fifth Amendment was passed for the purpose of protecting its citizens in cases of this kind. (***Pummelly v. Green Bay, 13 Wall. p. 166; Boyd v. United States, 116 U. S. p. 616***).

The second reason for granting the writ set forth in the petition is not supported by any of the decisions quoted by petitioners, as the decision in this case is not in conflict with any of the decisions of the United States Supreme Court or any of the Circuit Courts of Appeals.

The third reason for granting the writ set forth in the petition is not correct, as the decision of the Circuit Court of Appeals in this case could not be in conflict with the decision of a District Court. The decision of the Circuit Court of Appeals would in every instance override a District Court decision.

The reason set forth in paragraph 4 of the petition is not a sufficient reason for granting same. The fact that other cases are pending in lower courts involving the same question is no reason for granting this writ, as no new or important questions have been decided in this case. The opinion in this case is not in conflict with the decisions of the Supreme Court of the United States in cases of like kind.

In the last analysis, the principal reason the Government has for resisting complainant's demand is that if they are to pay for property in the designated federalized diversion channels provided for in the adopted plan, it would cost several hundred million dollars. What they are undertaking to do is to acquire millions of acres of land from the owners without any compensation whatsoever, and to use these lands as a diversion channel for additional destructive flood waters from the Mississippi River, and what they are asking is that the Court permit them to take this property without purchasing same and without any condemnation proceedings to obtain same.

The District Court expressly refused to countenance any such action upon the part of the defendants, and the Circuit Court of Appeals expressly refused to countenance any such action upon the part of the defendants.

Writs of certiorari are not granted in suits of this nature as a matter of right, but as a matter of discretion by the Supreme Court. There is nothing peculiar in the decision of the Court below, nor does the decision involve principles of far-reaching effect or that would overthrow settled administrative construction. (See ***United States v. Rimer, 220 U. S. 547.***)

Restraining officers of the United States Government from confiscating private property for public use without just compensation, does not establish any new principles of law, is not an unusual case in any sense, has no far-reaching effect, does not overthrow any settled administrative construction, and is no ground for certiorari.

For these and other good reasons as appear from the record in this cause, filed herein, this respondent respectfully asks that the application for writ of certiorari be denied.

Respectfully submitted,

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